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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1940

No.

COMPANIA ESPANOLA DE NAVEGACION MARITIMA S.A., and COMPAGNIE GENERALE DE NAVIGATION A VAPEUR CYPRIAN FABRE
Petitioners

AGAINST

ROBERTO HERNANDEZ, INC.
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioners, Compania Espanola de Navegacion Maritima S.A., a Spanish corporation, and Compagnie Generale de Navigation a Vapeur Cyprian Fabre, a French corporation, respectfully show:

This is a petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit to review its decision rendered January 6, 1941, reversing a judgment of the District Court for the Southern District of New York entered March 7, 1940 (R. 150-51). That judgment dismissed the complaint of Roberto Hernandez,

Inc., a New York corporation (respondent herein), in a suit brought under Section 30 of the Shipping Act, 1916 (46 U. S. C. 829) to enforce a reparation award by the United States Maritime Commission based on Section 22 of said Act (46 U. S. C. 821) for $25,050 with interest.

The complaint alleged a discrimination in the nature of conspiracy against plaintiff (respondent) for alleged refusal in 1934 to transport automobiles from New York to Spain. Although relying on the Shipping Act generally, the complaint was really based on Section 14 thereof (46 U. S. C. 812). The two petitioners were members, with another line, of an approved Conference under Section 15 of the Shipping Act (46 U. S. C. 814). The several Conference members operated as common carriers between New York and Spanish ports, including Bilbao.

The suit was tried in November 1939 before District Judge Galston without a jury, and he made special fact findings and conclusions in accordance with Rule 52 (R. 148-50).

The District Judge sustained some of the findings made by the Maritime Commission on the preliminary proceedings, and overturned others on the ground that they were not supported by the record. He found that the respondent had not proved financial ability to tender shipments, and had failed to avail of substitute service which could have been secured without extra cost, so that no damages were established by respondent. Under Section 30 of the Shipping Act (46 U. S. C. 829) the Commission's findings and order were merely "*prima facie* evidence of the facts therein stated". The case was tried fully before the District Court, with evidence on both sides additional to what had been submitted to the Maritime Commission.

The opinion of the Circuit Court of Appeals is reported in 116 F. (2d) 849, and that of the District Court in 31 F. Supp. 76.

Summary Statement

Respondent by its complaint claimed to have entered into an "oral contract" at New York on or about June 24, 1934, with one de Bareno, an automobile dealer of Bilbao, Spain, under which it was to ship to de Bareno at Bilbao an average of $25,000 worth of automobiles in each of the months June to December, 1934, to be purchased by de Bareno at 17½% off the New York retail price, with a commission to respondent of 15% (R. 4-5, 105). It seems that de Bareno was a cut-rate dealer at Bilbao competing actively with authorized distributors. There was no trace in writing of this $175,000 "contract". De Bareno gave a deposition at Bilbao (R. 103), and the Commission found that the contract existed. There was no contrary evidence in the District Court and this finding was sustained (R. 148).

Neither the Commission nor the District Court found that shipment over petitioners' Conference lines was required under said contract, nor did the complaint so allege (R. 3-7).

The only letter of credit opened by de Bareno was one of July 2, 1934, for $14,200 in favor of Hernandez, to expire August 2, which was extended to October 2. Hernandez shipped about $8,000 worth of automobiles to de Bareno, but claimed that due to unlawful discrimination by three carriers, including both petitioners, and their refusal to furnish space, it was prevented from shipping $167,000 worth of automobiles, which would have afforded Hernandez a profit of $25,050 in commissions, on the basis of which

loss of commission damage in that amount was claimed. The complaint did not allege that any effort whatever was made by Hernandez to ship over the lines of other carriers nor was there any evidence of any such effort by Hernandez. The theory of the complaint appears to be that respondent was entitled to recover the lost commission as damages if refusal of petitioners to carry was established, irrespective of other considerations. This was respondent's theory before the Commission (R. 89).

Hernandez had a 1934 all-shipment contract dated March 31, 1934, with the petitioners (and another line) as members of the Spanish Conference lines (R. 112-16), which permitted shipment over other lines in event space was not furnished as applied for (R. 115). This contract provided for arbitration at New York of "all differences and disputes of whatsoever nature" arising out of it. Hernandez did not demand arbitration and appears to have disregarded said contract. It was not submitted in the proceedings before the Maritime Commission and was first relied on by plaintiff at the trial in the District Court (R. 49-50, 54). The District Judge found that use of available substitute service was permissible to Hernandez under said contract, but that Hernandez "failed to avail of the same or to take other steps to mitigate the damage claimed" (R. 149).

The result of the reparation proceeding instituted by Hernandez before the Maritime Commission was a decision December 20, 1937, that the petitioners, together with Arnold Bernstein Company (not served in the District Court), were *jointly and severally* liable for discrimination, but that damages were not adequately shown (R. 81-90). As a result of further hearings the Commission on May 25, 1939, decided that damages were shown to be

$25,050, being the amount of commission Hernandez claimed would have been received had the $167,000 worth of automobile shipments, for which certain ships were calculated to have space, been transported to Bilbao, with interest on said amount from December 31, 1934 (R. 91-98).

The findings of the Commission sustained by the District Court appear at R. 148.

The holding of the Maritime Commission that petitioners were jointly and severally liable was based solely on the fact that the carriers were associated in a Conference under Section 15 of the Shipping Act. The North Atlantic Spanish Conference Agreement as approved by the Maritime Commission provides for "just and economic coöperation between steamship lines operating in this trade", etc. (R. 119). The Commission referred to a Conference cable of June 14, mistakenly as of July 19 (R. 87), in reply to a cable of June 9, 1934, from Spain, which stated, "Must advise you Shipping Board has ruled Conference lines cannot refuse contracts or shipments Stop Up to present no cars shipped" (R. 87, 96). Thus the Commission gave the cable an effect the reverse of its language, and implied a purpose on the part of the carriers to disregard their well known legal obligation, both under the law and under their Conference agreement, to accept shipments for carriage. Inasmuch as the Commission found the oral contract between Hernandez and de Bareno to have been made June 24, 1934 (R. 82) it simply was not possible that said cables referred to that matter.

It was mere matter of computation to figure the space that would have been available on particular sailings for complainant's shipments (assuming them to have been tendered). The result of the Commission's computation, totaling space for at least $167,000 worth of automobiles,

appears at R. 92-93. Neither technical skill nor administrative discretion was required to make such computation. The result of it was speculative at best, as the District Judge demonstrated—"a purely arbitrary analysis of speculative figures" (R. 138).

On this basis both in the District Court and the Circuit Court of Appeals petitioners contended that the Maritime Commission had no jurisdiction inasmuch as the plaintiff had the right to proceed immediately in Court for any legal damages it could establish. Nevertheless both courts upheld the jurisdiction of the Commission by reason of this Court's decision in *United States Nav. Co.* v. *Cunard S.S. Co.*, 284 U. S. 474.

Petitioners also denied in both Courts below any right of plaintiff to recover against the carriers other than severally, contending that the Conference agreement approved under Section 15 of the Shipping Act did not afford any basis for joint and several liability.

District Court Findings

Fact findings 2, 3 and 4 by the District Court were (R. 148-9):

2 "On May 25, 1939, the United States Maritime Commission, after further hearing rendered a second decision finding that the plaintiff could have obtained and shipped $167,000 worth of automobiles in compliance with its contract and in accordance with the bookings requested, and that plaintiff's net profit would have been 15 percent of $167,000, or $25,050, and entered the order which is the subject matter of this litigation. *Said finding and order are not supported by the record, are based on various uncertain and speculative factors, and are not sustained.*" (Italics ours.)

3 "The plaintiff did not have on hand or in transit the cars with which to avail of the space open on any designated sailing. Financial ability of the plaintiff to secure $167,000 worth of cars from June 1934 to December 31, 1934, so as to be able to tender shipment thereof was not proved."

4 "There was available to the plaintiff an equivalent substitute service with regular sailings via British or continental ports on through bills of lading in place of direct shipment from New York to Bilbao, Spain, and such transshipment was feasible for the plaintiff at the same transportation cost, and this was permissible under a contract dated March 31, 1934, which plaintiff had with defendants, but plaintiff failed to avail of the same or to take other steps to mitigate the damage claimed."

Conclusions of law 3 and 4 of the District Court were (R. 150):

3 "The plaintiff was under an obligation to mitigate or avoid damages, which could have been accomplished without extra cost through other available means of shipment which plaintiff failed to avail of."

4 "No damages have been established by plaintiff and the complaint should be dismissed."

Decision Below

The Circuit Court of Appeals, on the theory that there was no new evidence introduced by either party at the District Court trial, held that the *prima facie* findings of the Maritime Commission should have been upheld as correct (R. 163). This disregarded the findings of the District Judge which were distinctly based on additional evidence on the subject of damages introduced by both parties in the District Court. With respect to this new evidence regarding mitigation the Circuit Court of Appeals intimated that if respondent had applied to other

lines they *might* also have refused space to respondent. This was notwithstanding the clear finding of the District Court that the respondent had a clear opportunity to mitigate or prevent damages by availing of substitute routes, and was permitted to do so by its contract with petitioners —and notwithstanding the clear finding that respondent had not shown financial ability to tender shipments (R. 149).

The Court accepted (R. 163-4) the contention of Hernandez that the "contract" with de Bareno could not be met except by shipment over the Conference lines,—not urged in the proceedings before the Maritime Commission nor specified in the complaint, and not adopted, but rejected, by the District Court (R. 146-7). The finding of the District Court that other means of shipment were permissible and available would seem to have foreclosed acceptance of this contention.

Basis of Jurisdiction

Jurisdiction is based on Section 240 of the Judicial Code. The order for mandate was entered in the Circuit Court of Appeals on January 23, 1941.

Questions Presented and Reasons Relied on for Granting of the Writ

The decision of the Circuit Court of Appeals is in error:

1. In upsetting and failing to uphold the fact findings of the District Court, and failing to apply thereto Rule 52 of the Rules of Civil Procedure providing that findings of fact shall not be set aside unless clearly erroneous and that

due regard shall be given to the opportunity of the trial Court to judge the credibility of the witnesses. This error alone would appear to call for summary reversal of the decision.

The trial in the District Court involved substantial evidence in addition to what had been presented to the Maritime Commission. Hernandez testified before the District Judge and so did four witnesses for petitioners, on matters which were not presented at all to the Commission concerning the March 31, 1934, contract and avoidance of damages by availing of other shipping services.

The District Judge had full opportunity to judge credibility, which is reflected definitely by his positive findings 3 and 4 (R. 149). Hernandez was shifty and vague (see R. 59-69, 72-76). The earlier findings of the Maritime Commission were *prima facie* only under Section 30 of the Shipping Act (46 U. S. C. 829) subject to the same limitations as findings of the Interstate Commerce Commission (unlike findings of the National Labor Relations Board or the Securities Exchange Commission, for example, where there is no resort to the District Court, but only to the Circuit Court of Appeals).

The Circuit Court of Appeals was not entitled either to substitute its own views on the facts, or those of the Maritime Commission, for the fact findings of the District Judge.

2. In holding petitioners liable to respondent, only a broker, for damages measured by a commission which respondent would have realized from de Bareno had $167,000 worth of automobiles been shipped, not an element of legal damages chargeable against a common carrier for failure to accept shipments, either at common law or by reason of any provision in Section 14 of the Ship-

ping Act (46 U. S. C. 812); and in refusing to hold respondent bound (if recognized at all as entitled to claim) by the fundamental obligation to avoid or mitigate damage by using a substitute equal-cost shipment route which was proved available but not sought by respondent.

3. In holding the petitioners to joint and several liability (as between themselves and also another carrier not served and out of business) instead of only such liability as each carrier might have incurred by reason of its own failure to perform a common carrier duty, merely because of association of the carriers in an approved Conference agreement under Section 15 of the Shipping Act (46 U. S. C. 814).

Neither the Shipping Act itself nor the Conference agreement (R. 119) contains any provision implying responsibility of one Conference member for the act or default of another member. It seems clear that the several Conference members retain their individuality of action and responsibility in all respects, particularly as Section 15 of the Shipping Act expressly relieves them from the penalties of the Sherman Anti-Trust Act and forbids their activities as Conference members being regarded as conspiracy.

It is contrary to the intent and purpose of the Shipping Act, as well as of the Interstate Commerce Act, that one carrier should be held liable for the default of another carrier, unless specifically assumed by contract or imposed by law such as was done by the Carmack Amendment (49 U. S. C. 20 (11)). The imposition of joint and several liability on conference members constitutes an improper and unjust burden on common carriers and on commerce.

4. In upholding jurisdiction of the Maritime Commission over a controversy allegedly based on Sections 14 and 22 of the Shipping Act, 1916 (46 U. S. C. 812, 821), notwithstanding that no regulatory or administrative question was involved therein, but only a claim for damages which was susceptible of orderly and complete determination by the Courts.

The decision is contrary to that of this Court in *L. & N. R.R. Co.* v. *Cook Brewing Co.*, 223 U. S. 70, and a long line of other decisions which have resulted from and been applied to proceedings before the Interstate Commerce Commission. The theory of those decisions applies equally to proceedings whether or no before the Maritime Commission.

There is nothing in this Court's decision in *United States Nav. Co.* v. *Cunard S.S. Co.*, 284 U. S. 474, which justifies the reliance placed thereon below as concerns jurisdiction of the Commission where the claim is merely that of one private party against another for damages for breach of a common carrier obligation to receive shipments, without involvement of any matter of administrative discretion or judgment. The Shipping Act, unlike the Interstate Commerce Act (49 U. S. C. 9), does not give an option to proceed either before Commission or Court. Even as concerns the Interstate Commerce Commission, court cases are generally left to be dealt with by the courts.

WHEREFORE your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Circuit Court of Appeals for the Second Circuit commanding that Court to certify and send to this Court for its review and determination on a day certain to be therein named a full and complete tran-

script of the record and all proceedings in the case numbered and entitled on its docket No. 101, October Term, 1940, Roberto Hernandez, Inc., plaintiff-appellant v. Arnold Bernstein Schiffahrtagesellschaft, M.B.H., defendant, Compania Espanola de Navegacion Maritima S.A., and Compagnie Generale de Navigation a Vapeur Cyprian Fabre, defendant-appellees, and that the decision of said Circuit Court of Appeals in said case be reversed, and that your petitioners have such other and further relief in the premises as may be just.

New York City,
April 18, 1941.

COMPANIA ESPANOLA de NAVEGACION MARITIMA S.A., and COMPAGNIE GENERALE de NAVIGATION a VAPEUR CYPRIAN FABRE.

By BURTON H. WHITE
ROSCOE H. HUPPER
Counsel

Certificate

I hereby certify that I have examined the foregoing petition and in my opinion it is well founded and entitled to favorable consideration of the Court, and that it is not filed for the purpose of delay.

BURTON H. WHITE
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